Office - Supreme Court, U.S.
FILED
MAR 20 1985
ALEXANDER L. STEVAS,
CLERK

84-1478
No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALPHA BLAIR
Plaintiff-Appellant

vs.

LARRY BOULGER
Defendant-Appellee

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

JURISDICTIONAL STATEMENT

ALPHA BLAIR
P.O. Box 33
Moorhead, Minnesota
56560

40 pp

QUESTIONS PRESENTED

1. Has the Supreme Court of North Dakota in affirming a Summary Judgment decision by an inferior state court, so far sanctioned and departed from the accepted and usual course of judicial proceedings, as to call for an exercise of the Supreme Court of the United States Power of Supervision as explicitly granted by Section 25 of the Judiciary Act of 1789?

2. Is a United States citizen, the Appellant, immune to a North Dakota state court Summary Judgment decision voiding cancellation of a contract for deed, since the decision is clearly erroneous, and violates due process and federally assured freedom of contract rights guaranteed by the Fourteenth Amendment of the United States Constitution?

3. Is a United States citizen, the Appellant, immune to a North Dakota Summary Judgment decision, which appears to violate Article 1, Section 10, Paragraph 1 of the United States of America Constitution which forbids states to impair the obligation of contracts?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below subject to this Appeal are set forth in the caption of the Appeal.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings Below	ii
Table of Contents	iii
Table of Authorities	iv
Reports	1
Grounds Upon Which Jurisdiction Is Invoked	2
Provisions Involved	2
Statement of the Case	5
Substantiality of the Federal Question	10
Appendix	
Appendix A: Decision of Supreme Court of North Dakota, November 28, 1984	A-1
Appendix B: Denial of Petition for Rehearing by Supreme Court of North Dakota, December 19, 1984	B-1
Appendix C: Substituted Opinion of Supreme Court of North Dakota, February 1, 1985	C-1
Appendix D: Order Awarding Summary Judgment of inferior State District Court, February 27, 1984	D-1
Appendix E: Judgment of inferior State District Court, March 5, 1984	E-1
Appendix F: Notice of Appeal	F-1
Appendix G: Cancellation of Contract for Deed	G-1

TABLE OF AUTHORITIES

	Page
Cases:	
Allgeyer v. Louisiana, 165 U.S. 578 (1897)	13
Armco Steel Corp. v. Realty Inv. Co., 273 F2d 483 CC.A 8th (1960)	10
Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61n.3 (1963)	2
Dartmouth College v. Woodward, 4 Wheat. 519 (1819)	13
Fletcher v. Peck, 6 Cr. 87, (1810)	13
Lochner v. New York, 198 U.S. 45 (1905)	13
Marbury v. Madison, 5 U.S. 1 Cranch 137, 2 L.Ed. 60 (1803)	11
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed 579 (1819)	11
United States v. U.S. Gypsum Co., 333 U.S. 364, 92, L.Ed. 748, 68 SupCt. 525 (1947)	12
United States v. Oregon State Medical Soc., 343, U.S. 326, 96, L.Ed. 978, 72 SupCt. 690 (1951)	12
Constitution:	
United States of America Constitution, Article I, Section 10, Paragraph 1	i, 2
United States of America Constitution, Amendment XIV, Section 1	i, 2
Statutes:	
28 U.S.C. Paragraph 1257 (2)	2

Section 25 of Judiciary Act of 1789 i

North Dakota Stat. 9-09-04 N.D.C.C. 3

North Dakota Stat. 32-04-13 N.D.C.C. 4, 12

Rules:

Rule 62(a) North Dakota Rules of Civil Procedure 7

No. ————

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALPHA BLAIR

Plaintiff-Appellant

vs.

LARRY BOULGER

Defendant-Appellee

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

JURISDICTIONAL STATEMENT

REPORTS

The opinion of the Supreme Court of North Dakota is reported at *Blair v. Boulger,* 358 NW2d., 522 (N.D. 1984) and printed in Appendix A. Substituted Opinion is in Appendix C. No opinion was given by the Supreme Court of North Dakota in denying the Petition for Rehearing. The order is printed in the Appendix B, hereto. Order Awarding Summary Judgment of inferior State District Court is printed in Appendix D. The inferior District Court Judgment is printed in Appendix E.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

This is an appeal from a decision of the Supreme Court of North Dakota in affirming a Summary Judgment decision of an inferior state court in which ownership of real estate property was awarded to the defendant-appellee. The Supreme Court of North Dakota issued its ruling on November 28, 1984. A timely petition for rehearing was filed by the Plaintiff-Appellant with the Supreme Court of North Dakota. The Supreme Court of North Dakota denied the Petition for Rehearing December 19, 1984. A substituted opinion of that court was entered February 1, 1985. A timely notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of North Dakota and the Clerk of Court of Cass County, North Dakota, District Court on March 19, 1985. The jurisdiction of this Court is invoked under 28. U.S.C. Paragraph 1257 (2). The following case supports the exercise of the Court's appellate jurisdiction:

> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61 n.3 (1963).

PROVISIONS INVOLVED

United States of America Constitution Article I, Section 10, Paragraph 1:

> No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts or grant any title of nobility.

United States of America Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Dakota Statute 9-09-04:

Rules governing rescission.—Rescission, when not effected by consent or pursuant to sections 9-08-08 and 9-08-09, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

1. He must rescind promptly upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability and is aware of his right to rescind; and

2. He must restore to the other party everything of value which he has received from him under the contract or must offer to restore the same upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so.

Source: Civ. C. 1877, Paragraph 967; R.C. 1895, Paragraph 3934; R.C. 1899 Paragraph 3934; R.C. 1905, Paragraph 5380; C.L. 1913, Paragraph 5936; R.C. 1943, Paragraph 9-0904. Derivation: Cal. Civ. C., 1691.

North Dakota Statute 32-04-13:

When specific performance cannot be enforced against one.—Specific performance cannot be enforced against a party to a contract in any of the following cases:

1. If he has not received an adequate consideration for the contract.

2. If it is not as to him just and reasonable.

3. If his assent was obtained by misrepresentation, concealment, circumvention, or unfair practice of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled.

4. If his assent was given under the influence of mistake, misapprehension, or surprise, except that when the contract provides for compensation in case of mistake, a mistake within the scope of such provision may be compensated for and the contract specifically enforced in other respects, if proper to be so enforced.

Source: Civ. C. 1877, Paragraph 2000; R.C. 1895, Paragraph 5030; R.C. 1899, Paragraph 5030; R.C. 1905, Paragraph 6615; C.L. 1913, Paragraph 7198; R.C. 1943, Paragraph 32-0413. Derivation: Cal. Civ. C., 3391.

STATEMENT OF THE CASE

Appellant is a poor widow, 76 years old, having no other income than a modest monthly Social Security check.

On January 8, 1974 she signed a Contract for Deed with the defendant in which the defendant was to purchase her house at Fargo, North Dakota.

The sum was $14,000, which was many thousands of dollars below the appraised value. She was to receive $7,000 down payment and to live in the house at the rate of $100 a month rent until payment in full, which was deducted from the remaining amount due. There was an interest of 7½ per cent annually on the declining balance due. The payments would take about 5 years.

Defendant, about two years after signing the contract for deed, began making demands upon the Appellant's son demanding the payment of more than $5,000 in alleged rent. The Appellant's son was employed out of town and was not living in the apartment when the demands were made.

Appellant felt the Defendant was attempting to collect $200 a month rent for her apartment in violation of the contract.

A lawsuit on fraud against the Defendant was begun.

Before the case came to trial, on advice of Appellant's legal counsel, it was dropped, and a new lawsuit on her capacity to sign the contract for deed was filed.

Appellant and her son faced a counter-suit by Defendant for starting the first lawsuit and Defendant was awarded damages.

Before any of the cases came to trial, a breach of the contract was discovered by the Appellant. Thirty-days notice of cancellation was given and the contract was cancelled.

The contract provided that the property was to be insured with the Appellant's insurance contract at the fully insured value. The Defendant had switched insurance contracts without her consent and had the property insured at only 41.6% of the full value, when it was supposed to have been insured at all times at 100% of value.

The Appellant was in a greatly exposed position in event of fire or other disaster. She was supposed to have been protected from that event by the terms and conditions of the contract, in which the Defendant was instructed to not allow her insurance contract to lapse.

On discovery of the breach, Appellant immediately took out the full insurance coverage with the specified insurer. This was all done before the contract for deed expired.

Appellant offered to restore all monies and everything of value received from Defendant pertaining to the property.

Defendant had been asked at the start of legal proceedings in 1976 if he had done anything contrary to the contract for deed. He replied in the negative and thus had concealed from the Appellant changes in the insurance.

Appellant paid all of the real estate taxes for six years from the date of cancellation of the contract for deed plus full insurance on the house, and for many other repairs.

The lawsuit on capacity was scheduled for trial in 1984. Defendant, before the trial, moved for Summary Judgment, and also to strike a jury trial, made a motion to dismiss pleadings and a motion to dismiss cancellation of the contract for deed by Appellant.

The inferior court judge ruled Summary Judgment for the Defendant, contending that a second case would be res judicata. He awarded the Defendant specific performance and voided the cancellation of the contract for deed and dismissed the Appellant's complaint against the Defendant. The Appellant's complaint was based upon incapacity to sign the 1974 contract.

Thereupon, A Nunc Pro Tunc hearing was held before the original judge in the counter-claim trial, who stated the issues were not res judicata, and that he had not ruled upon all the issues as said by the judge who awarded Summary Judgment.

The Defendant had twice previously moved for Summary Judgment, and had twice previously, by two North Dakota district judges, been denied Summary Judgment.

The Defendant then caused the Sheriff to lock the Appellant out of her house on April 3, 1984, when she was not a home. She had received no personal notice.

In North Dakota, there is a statute requiring a 10-day waiting period from the time of notice of entry of judgment before execution. (Rule 62(a) N.D.R. Civ. P.)

In this instance, notice of entry of Judgment and execution was on the same day and the sheriff was sent out before the 10-day execution time.

Appellant sought restraining orders and stays to get back into her house and was denied several times by the inferior court judge who issued the Summary Judgment order.

It took four months of legal effort for the Appellant to get to the Supreme Court of North Dakota to request a stay of mandate. That court denied it on grounds of non-compliance with the rules. A second attempt was made following compliance with the rules, whereupon, the Supreme Court of North Dakota denied it as a right of discretion.

On November 28, 1984, the Supreme Court of North Dakota upheld the Summary Judgment of the inferior court.

A timely Petition for Rehearing was filed by the Appellant.

The Supreme Court of North Dakota denied the Petition for Rehearing on December 19, 1984.

On February 1, 1985, the Supreme Court of North Dakota entered an order of substitution in the opinion filed November 28, 1984.

Appellant has sustained losses totalling $125,000 since getting involved in the North Dakota judicial system. This includes the value of the house, legal fees and other costs.

In addition, her personal property has been confiscated and she has not had a bed to sleep in for nine months. Her

clothes, Bible, pots and pans, furniture, and countless other items have been withheld from her.

Appellant was seriously injured in a car accident six months before she signed the contract for deed. Wreckage hit her in the head and back.

She was under the care of The Neuro-Psychiatric Institute at Fargo, North Dakota, and was taking drugs when she signed the contract for deed. She subsequently underwent three brain operations at Minneapolis, Minnesota. Her attending physican said her brain cells had swollen to five times the size of normal and she was injured at the time she had signed the contract.

All items concerning her medical condition at the time of the signing of the contract have been unable to be presented, because of the Summary Judgment decision. They are mentioned here to indicate what issues would have been raised had a jury trial been held.

Appellant has been reduced to the state of being a pauper by her treatment in the North Dakota courts.

This is a very sad case for a United States citizen, and one that needs the attention of the Supreme Court of the United States to right several wrongs that have been committed in North Dakota courts.

THE SUBSTANTIALITY OF THE FEDERAL QUESTION PRESENTED

The Supreme Court of North Dakota, in its November 28, 1984 opinion said,

> "We need not decide the issue of res judicata because this case can be disposed of on the issue of rescission."

(Page 3, Appendix A)

Appellant submits that the Supreme Court of North Dakota has sanctioned and departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court of the United States' Power of Supervision. These federal issues are first raised in this instance.

This is because Summary Judgment is issued only when there is no doubt of the facts.

In this instance, there is a doubt of the facts, concerning res judicata, as was brought to the attention of the Supreme Court of North Dakota. The original district judge who presided at the counter-claim trial saying it was not res judicata, and the other judge who granted Summary Judgment saying it was. The Supreme Court of North Dakota can, therefore, not affirm Summary Judgment by leaving the issue of res judicata dangling and undecided.

As a result, Summary Judgment cannot be affirmed, since there are important facts which have not been decided.

Summary Judgment is to be denied whenever there is the slightest doubt of the facts. *Armco Steel Corp. v. Realty Inv.*

Co., 273 F2d 483 (C.A. 8th, (1960).

The case of *Marbury v. Madison* 5 U.S. (1 Cranch 137, 2 L.Ed. 60(1903) is significant for expounding the constitutional theory of judicial review to determine if acts are repugnant to the United States Constitution.

McCulloch v. Maryland, 17. U.S. (4 Wheat) 316, 4 L.Ed. 579 (1819) established that the end needs to be legitimate to lie within the scope of the Constitution.

The Supreme Court of North Dakota, in affirming Summary Judgment in the circumstance at hand, fails to meet the test of legitimacy and its opinion is repugnant to the Constitution. An exercise of the Power of Supervision of the Supreme Court of the United States is needed to return to an accepted course of judicial proceedings in this case. Appellant is being deprived of due process rights guaranteed by the Fourteenth Amendment of the Constitution.

The District Court granted specific performance to the Defendant even though the Defendant had substituted a different insurance contract at only 41.6% of the fully insured value. This substitution was in direct violation of the terms and conditions of the contract for deed which stated the Defendant was not allowed to let the Appellant's contract to lapse. Further, that he must receive permission from the Appellant before taking out a different insurance contract.

Clearly, specific performance cannot be enforced in this instance, and especially when the actions of the Defendant had been concealed from the Appellant.

North Dakota has a statute dealing with this matter. Section 32-04-13 of tn N.D.C.C. Specific performance of a contract is an extraordinary remedy at all times and clearly should not be permitted with the facts of this case.

Appellant believes she is immune to the Supreme Court of North Dakota decision in affirming Summary Judgment since the decision is clearly erroneous.

There are a number of Federal decisions concerning erroneous findings.

These are cases when the reviewing court is left with the definite and firm conviction that a mistake has been committed.

They include *United States v. U.S. Gypsum Co.*, 333 U.S. 364, L.Ed. 746, 68 SupCt. 525 (1947) and *United States v. Oregon State Medical Soc.*, 343 U.S. 326 96, L.Ed. 978, 72, SupCt. 690 (1951).

Appellant, in a Petition for Rehearing to the Supreme Court of North Dakota, pointed out the great error of that Court and the inferior North Dakota court in labeling a cancellation of contract an act of rescission. That Court denied the Petition without opinion.

Appellant maintains the decision violates the federally assured freedom of contract rights guaranteed by the Fourteenth Amendment of the United States Constitution.

The contract for deed specifically gives the Appellant the right to cancel for breach of contract. This she rightly did.

The inferior North Dakota Court labeled the cancellation a rescission action, and Appellant asserts this violates the freedom to make a contract. This freedom to make a contract being upheld by *Allgeyer v. Louisiana* (165 U.S. 578, (1897) and *Lochner v. New York* 198 U.S. 45 (1905).

Further, Appellant maintains that North Dakota statute Section 9-09-04 impairs the obligation of this contract, since that section refers to only rescission and not cancellation. The United States Constitution forbids a state to impair the obligation of contracts as decided in *Fletcher v. Peck* (6 Cr.87, (1810) and states are forbidden to start action impairing the obligation or altering the obligation of contracts in *Dartmouth College v. Woodward* (4 Wheat. 519 (1819).

This case, therefore, raises substantial federal questions. Wherefore, your Appellant prays that the Court note jurisdiction over this appeal.

Respectfully submitted this 19th day of March, 1985.

ALPHA BLAIR
Box 33
Moorhead, Minnesota 56560
Plaintiff-Appellant

APPENDIX A

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Alpha Blair — Plaintiff and Appellant

v.

Larry Boulger — Defendant and Appellee

Civil No. 10,709

Appeal from the District Court of Cass County, the Honorable Robert L. Eckert, Judge.

AFFIRMED.

Opinion of the Court by VandeWalle, Justice.

Alan J. Sheppard, Fargo, for plaintiff and appellant.

John V. Boulger, of Solberg, Stewart, Boulger & Miller, Fargo, for defendant and appellee.

Filed by Clerk
Supreme Court
November 28, 1984

Civil No. 10,709

BLAIR v. BOULGER

VandeWalle, Justice.

Alpha Blair appealed from a summary judgment ordered by the district court of Cass County in favor of Larry Boulger. The trial court held that Alpha Blair's action for rescission of a contract for deed was barred by the rule of res judicata and that Alpha Blair had failed to properly rescind under Section 9-09-04, N.D.C.C. We affirm.

Alpha Blair and Larry Boulger have been involved in litigation concerning certain rental property since shortly after Alpha Blair sold that property to Larry Boulger in 1974. Under the contract for deed, Larry Boulger paid $7,000 to Alpha Blair as a down-payment on the property. The contract further provided that the unpaid principal of $7,000 would be paid to Alpha Blair in the form of rent credit at the rate of $100 per month set off against the unpaid principal. Under the contract Larry Boulger was to pay interest on the unpaid principal of $7,000, provide property insurance, heat and water, and furnish all reasonable repairs, paint, and maintenance needed for the property. In Alpna Blair's first action, *Blair v. Boulger,* 336 N.W.2d 337 (N.D. 1983), Alpha sought to have the contract for deed canceled on the basis of fraud and fraudulent representations by Boulger. Boulger counterclaimed, alleging that Richard Blair, Alpha Blair's son, had interfered with the contractual rights of Boulger and Alpha Blair. Boulger further alleged that Alpha Blair had breached the contract for deed.

Prior to trial Alpha Blair moved to dismiss her complaint with prejudice. The motion was granted as to the issues set forth in her complaint. The trial court proceeded on Boulger's counterclaim. The court found that Richard Blair had intentionally and maliciously interfered with the contractual relations of Alpha Blair and Boulger and that Alpha Blair had breached the contract with Boulger.

Richard Blair appealed from the judgment awarding Boulger compensatory and exemplary damages for Richard's intentional interference with contractual relations between Boulger and Alpha Blair. After reviewing the record we determined there was adequate evidence to support the trial court's finding. See *Blair v. Boulger, supra.*

The case now before us commenced in April of 1980 when Alpha Blair brought suit to rescind the 1974 contract for deed, alleging incapacity to contract. At the second trial Alpha argued that when she dismissed her complaint in the first action she specifically reserved her right to bring another action based upon incapacity to contract. The trial court granted summary judgment to Boulger. The court held that Alpha Blair's cause of action for rescission based upon incapacity to contract was barred under the rule of res judicata by a prior decision of the court finding that a contract for deed existed between Alpha Blair and Boulger and that Richard Blair had wrongfully interfered with the contractual relations of the parties. The court further based its summary judgment upon Alpha Blair's failure to comply with Section 9-09-04, N.D.C.C., as required for an action to rescind a contract. The court found that Alpha Blair neither restored nor offered to restore to Boulger everything of value which she had received from Boulger.

We need not decide the issue of res judicata because this case can be disposed of on the issue of rescission. We will assume for purposes of this opinion that the first action by Alpha Blair was not res judicata of the second action for rescission; but Alpha Blair may not rescind the contract for deed because she failed to comply with the statutory requirements for rescission.

In this case Alpha Blair sent a notice of rescission and offer of restoration to Boulger in February of 1980. Alpha offered to restore only the real estate taxes paid by Boulger, the $7,000 down-payment, and the interest payments made by Boulger on the unpaid balance of the purchase price. In her complaint Alpha offered to restore the $7,000 down-payment. Alpha did not restore or offer to restore insurance premiums and expenses paid by Boulger on the property. Furthermore, Alpha did not restore or offer to restore the additional $7,000 paid to her in the form of rent credit at $100 per month set off against the unpaid principal.

The right to rescind a contract is governed by our statutes. See Sections 9-09-01 to 9-09-04, N.D.C.C. Under Section 9-09-04, a contracting party may rescind only if he uses reasonable diligence to rescind promptly and to restore to the other party everything of value which was received under the contract. See *Alton's, Inc. v. Long,* 352 N.W.2d 198 (N.D. 1984); *Donovan v. Dickson,* 37 N.D. 404, 164 N.W. 27 (1917); *Anderson v. First Nat. Bank of Grand Forks,* 4 N.D. 182, 59 N.W. 1029 (1894). Restoration of the status quo as a requirement for rescission of a contract is based upon the principle that he who seeks equity must do equity. *Khabbaz v. Swartz,* 319 N.W.2d 279 (Iowa 1982). A party seeking rescission is not allowed to place conditions on his

restoration or offer to make restoration of everything of value received under the contract except as permitted by Section 9-09-04, N.D.C.C. *Alton's, Inc. v. Long, supra.*

We have held that compliance with these rules is a condition precedent to the maintenance of an action to rescind. *Alton's, Inc. v. Long, supra; Robertson Companies, Inc. v. Kenner,* 311 N.W.2d 194 (N.D. 1981); *Gerhardt v. Fleck,* 256 N.W.2d 547 (N.D. 1977); *Volk v. Volk,* 121 N.W.2d 701 (N.D. 1963).

In *Alton's, Inc. v. Long, supra,* this court was faced with the question of whether or not the plaintiff complied with the statutory requirements for rescission. In that case, the plaintiff had purchased a hotel on a contract for deed. Over a period of five months the plaintiff had to make numerous repairs to fix leaks in the hotel's roof. Subsequently, during a heavy rain, the roof of the building leaked considerably, damaging the interior of the hotel. The plaintiff brought an action for rescission and in its complaint, offered to return the premises if the sellers would pay all of plaintiff's damage.

We concluded in *Alton's, Inc., supra,* 352 N.W.2d at 200, that

> " . . . Alton's offer to restore contained in the complaint was defective and did not satisfy the statutory requirements. Alton's offered to restore only 'the premises', and this offer was conditioned upon the Sellers' payment of all damages. To be effective, Alton's offer to restore should have included an offer to restore rents collected or the reasonable value of the use of the premises for the period Alton's occupied the building. Also, an effective offer could not be conditioned upon the

Sellers' payment of Alton's damages. Under Section 9-09-04, N.D.C.C., it is contemplated that the parties will be placed in their original position. In order to effect a rescission, each party is to return to the other all items of value received under the contract. Consequently, Alton's could not demand that the Sellers pay damages, including loss of anticipated profits, as a prerequisite to return of the premises."

See also *Schaff v. Kennelly,* 61 N.W.2d 538 (N.D. 1953).

We conclude that the trial court's finding that Alpha Blair neither restored nor offered to restore to Boulger everything of value which she received from him under the contract is not clearly erroneous. Rule 52(a), N.D.R.Civ.P. Because Alpha Blair failed to comply with the statutory requirements for rescission found in Section 9-09-04, she is not entitled to rescind the contract for deed.

The order of summary judgment is affirmed.

Gerald W. VandeWalle
Vernon R. Pederson
H.F. Gierke III
P.M. Sand
Ralph J. Erickstad C.J.

APPENDIX B

STATE OF NORTH DAKOTA
SUPREME COURT
BISMARCK

Clerk of the Supreme Court
Mrs. Luella Dunn

December 19, 1984

Ms. Alpha Blair
2225 4th Avenue South
Moorhead, MN 56560

RE: BLAIR v. BOULGER
No. 10,709

Dear Ms. Blair:

The Supreme Court has today entered an Order denying the Petition for Rehearing in the above case.

In accordance with Rule 41(a), NDRAppP, the mandate of the Supreme Court will be forwarded to the Clerk of the District Court after the expiration of seven days.

Sincerely yours,
Luella Dunn, Clerk
Supreme Court

ck

cc: Mr. John V. Boulger
Mr. Leland F. Hagen
The Honorable Robert L. Eckert

APPENDIX C

IN THE SUPREME COURT)
STATE OF NORTH DAKOTA)

File No. 10,709

Alpha Blair, Plaintiff and Appellant

v.

Larry Boulger, Defendant and Appellee

ORDERED, that pages 3 and 7 of the opinion filed in this case on November 28, 1984, be deleted and that pages 3 and 7 filed this day be substituted therefor.

The Supreme Court of the State of North Dakota convened at 11:00 a.m. this 1st day of February, 1985, with the Chief Justice, the Honorable Ralph J. Erickstad; the Honorable Gerald W. VandeWalle, the Honorable H.F. Gierke III, Justices; and the Clerk of the Supreme Court, Luella Dunn, being present and directed the entry of the above order.

Luella Dunn
Clerk
North Dakota Supreme Court

The case now before us commenced in April of 1980 when Alpha Blair brought suit to rescind the 1974 contract for deed, alleging incapacity to contract. At the second trial Alpha argued that when she dismissed her complaint in the first action she specifically reserved her right to bring another action based upon incapacity to contract. The trial court granted summary judgment to Boulger. The court held that Alpha Blair's cause of action for rescission based upon incapacity to contract was barred under the rule of res judicata by a prior decision of the court finding that a contract for deed existed between Alpha Blair and Boulger and that Richard Blair had wrongfully interfered with the contractual relations of the parties. The court further based its summary judgment upon Alpha Blair's failure to comply with Section 9-09-04, N.D.C.C., as required for an action to rescind a contract. The court determined that Alpha Blair neither restored nor offered to restore to Boulger everything of value which she had received from Boulger.

We need not decide the issue of res judicata because this case can be disposed of on the issue of rescission. We will assume for purposes of this opinion that the

See also *Schaff v. Kennelly*, 61 N.W.2d 538 (N.D. 1953).

Because Alpha Blair failed to comply with the statutory requirements for rescission found in Section 9-09-04, she is not entitled to rescind the contract for deed.

The summary judgment is affirmed.

Gerald W. VandeWalle
Vernon R. Pederson
H.F. Gierke III
Ralph J. Erickstad C.J.

Filed by Clerk
Supreme Court
February 1, 1985

APPENDIX D

IN DISTRICT COURT, COUNTY OF CASS
STATE OF NORTH DAKOTA

Alpha Blair,	)	
	)	Case No. 80-455
Plaintiff,	)	
vs.	)	ORDER AWARDING
	)	SUMMARY
Larry Boulger,	)	JUDGMENT
Defendant.	)	

On February 16, 1984, a hearing was held in the above Court before Judge Robert L. Eckert at 10:00 a.m. in the Richland County Courthouse in Wahpeton, North Dakota. Plaintiff, Alpha Blair, was represented by her attorney, James Patrick Barone and Defendant, Larry Boulger, was represented by his attorneys, Leland F. Hagen and John V. Boulger. The hearing was scheduled for the following motions:

1. Defendant's Motion to Dismiss Attempted Cancellation dated January 14, 1984;

2. Defendant's Motion for Summary Judgment dated January 14, 1984;

3. Defendant's Motion for Summary Judgment dated January 14, 1984;

4. Defendant's Motion to Dismiss Pleading dated January 14, 1984.

The Court considered the pleadings and affidavits including:

1. Defendant's Pre-Trial Brief and Brief in Support of

Motions dated January 14, 1984;

2. Plaintiff's Answer Brief in Response to Defendant's Motion dated January 27, 1984;

3. Defendant's Pre-Trial Response Brief dated February 6, 1984;

4. Stipulated Facts dated January 12, 1984;

5. Affidavits of Lawrence J. Boulger dated January 14, 1984, and February 7, 1980;

6. Affidavit of John V. Boulger dated January 14, 1984;

7. Affidavit of Alpha Blair dated January 27, 1984; and

8. Second Affidavit of Lawrence J. Boulger dated February 6, 1984.

In addition, the Court considered the pleadings and files in this matter, the Court's file in case no. 155-48569 (first action), a lawsuit of Alpha Blair and Richard Blair, Plaintiffs vs. Larry Boulger, in which judgment was entered on August 25, 1982, and the arguments of counsel.

At the hearing, counsel were in agreement that the only cause of action stated in Plaintiff's Complaint is based on capacity to contract and that Plaintiff has no cause of action based on consideration or unjust enrichment.

The Court having thoroughly reviewed this file, including the documents previously referred to and having considered the argument of counsel, it appears to the Court that this matter is res judicata based on the decision of the Cass County District Court in the first action including the finding

and conclusion by the Court that a Contract for Deed existed between Alpha Blair and Larry Boulger concerning the subject property dated January 8, 1984, which contract Richard Blair wrongfully interfered with and Alpha Blair breached.

This is an action for rescission of a contract. In order to effect a rescission, Alpha Blair was required to comply with the requirements of N.D.C.C. Paragraph 9-09-04. Plaintiff did not do so. Plaintiff neither restored nor offered to restore to Defendant everything of value which Plaintiff had received from Defendant.

With respect to Plaintiff's attempted cancellation of the Contract for Deed by a Notice entitled "Cancellation of Contract for Deed" dated December 31, 1979, and documents filed thereafter, Plaintiff's Notice is defective in that it fails to meet the requirements of N.D.C.C. Paragraph 32-18-02. It fails to state the time when said cancellation or termination shall take effect. Plaintiff further failed or refused to allow Defendant to correct any alleged default. The Cancelation Notice is thus void and of no legal effect.

It appears to the Court that there is no issue of material fact and as a matter of law based on the foregoing, Defendant is entitled to an award of Summary Judgment as prayed for in his Motion.

THEREFORE, IT IS HEREBY THE ORDER OF THIS COURT, That Defendant Larry Boulger shall have summary judgment against Plaintiff Alpha Blair:

1. Dismissing Plaintiff's Complaint against Defendant and denying all relief requested therein;

2. Dismissing and avoiding of record, including in the records of theRegister of Deeds for Cass County, North Dakota, the attempted cancellation by Alpha Blair stemming from the document entitled "Cancellation of Contract for Deed" dated December 31, 1979, and filed with the Register of Deeds, Cass County, North Dakota, on December 31, 1979, and avoiding any transfer, conveyance or other acts by Alpha Blair subsequent thereto affecting record title. A copy of the Judgment in this action certified by the Clerk of Court shall be recorded with the Cass County Register of Deeds reflecting the dismissal and voiding of said entries;

3. Larry Boulger is awarded specific performance of the Contract for Deed dated January 8, 1974, between the parties and Plaintiff Alpha Blair is forthwith required to transfer good and marketable title to Larry Boulger, free from any claim, title or interest in Alpha Blair or any other person, by Warranty Deed, as required by the subject Contract for Deed. If Plaintiff Alpha Blair has not delivered a Warranty Deed for the subject property to Larry Boulger by March 12, 1984, Larry Boulger may cause a certified copy of the Judgment in this action to be recorded with the Cass County Register of Deeds. This Judgment shall be sufficient to transfer good and marketable title in the subject property to Larry Boulger, free from any claim, title or interest in Alpha Blair or any other person claiming through her. Larry Boulger shall be entitled to possession of the subject property, including the main floor apartment, on March 12, 1984;

4. Any lis pendens filed against the subject property shall be canceled and dismissed of record effective immediately upon the transfer of the subject property by deed from Alpha Blair to Larry Boulger or by the recording of a certified copy

of the Judgment transferring title of the subject property from Alpha Blair to Larry Boulger.

5. The subject property referred to herein and the property effected by this Order is located in the County of Cass, State of North Dakota and is described as follows:

> Lot Five (5) in Block Fifteen (15) of the Original Townsite to the City of Fargo, according to the certified plat thereof on file and of record in the office of the Register of Deeds in and for said county and state.

6. Defendant Larry Boulger shall have his costs and disbursements to be taxed and allowed by the clerk.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 27th day of February, 1984.

Robert L. Eckert
Judge of District Court

APPENDIX E

IN DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA

Alpha Blair,	)	
	)	Case No. 80-455
Plaintiff,	)	
vs.	)	JUDGMENT
	)	
Larry Boulger,	)	
Defendant	)	
	)	

Defendant's Motion for Summary Judgment, having come before the Court, the Honorable Robert L. Eckert presiding, on the 16th day of February, 1984, and the Plaintiff, Alpha Blair having appeared through her attorney, James Patrick Barone, and the Defendant having appeared through his attorneys, Leland F. Hagen and John V. Boulger; the Court having reviewed and considered the pleadings, files, briefs, affidavits and arguments of counsel and having issued its Order Awarding Summary Judgment dated February 27, 1984,

NOW, THEREFORE, in accordance with said Order Awarding Summary Judgment, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That Defendant Larry Boulger shall have Summary Judgment against Plaintiff Alpha Blair as follows:

1. Plaintiff's Complaint against Defendant is dismissed and all relief requested therein is denied.

2. The attempted cancellation by Plaintiff Alpha Blair stemming from document entitled "Cancellation of Contract for Deed" dated December 31, 1979, and filed with the Register of Deeds, Cass County, North Dakota on December 31, 1979, is dismissed and declared to be void of record, including in the records of the Register of Deeds for Cass County, North Dakota. Any transfer, conveyance or other acts of Alpha Blair subsequent to that "Cancellation of Contract for Deed" dated December 31, 1979, is void. A certified copy of this Judgment shall be recorded with the Cass County Register of Deeds reflecting the dismissal and voiding of said entries.

3. Larry Boulger is awarded specific performance of the Contract for Deed dated January 8, 1974, between the parties. Plaintiff Alpha Blair is forthwith required to transfer goods and marketable title to Larry Boulger, free from any claim, title or interest in Alpha Blair or any other person by Warranty Deed, as required by the subject Contract for Deed. If Plaintiff Alpha Blair has not delivered a Warranty Deed for the subject property to Larry Boulger by March 12, 1984, Larry Boulger may cause a certified copy of this Judgment to be recorded with the Cass County Register of Deeds, which Judgment will be sufficient to transfer good and marketable title in the subject property to Larry Boulger free from any claim, title or interest in Alpha Blair or any other person claiming through her.

4. Larry Boulger shall be entitled to possession of the subject property, including the main floor apartment, on March 12, 1984.

5. Any lis pendens filed against the subject property shall be canceled and dismissed of record effective immediately upon the transfer of the subject property by deed from Alpha Blair to Larry Boulger or by the recording of a certified copy of this Judgment transferring title of the subject property from Alpha Blair to Larry Boulger.

6. The subject property referred to herein and the property effected by the order in this Judgment is located in the County of Cass, State of North Dakota and is described as follows:

> Lot Five (5) in Block Fifteen (15) of the Original Townsite to the City of Fargo, according to the certified plat thereof on file and of record in the office of the Register of Deeds in and for said county and state.

7. Defendant Larry Boulger shall have his costs and disbursements from Plaintiff Alpha Blair taxed and allowed in the amount of $106.70.

WITNESS, the Honorable Robert L. Eckert, District Judge, acting as one of the judges of the District Court in and for the East-Central Judicial District, Cass County, North Dakota, and my hand and the seal of this Court, this 5th day of March, 1984.

Ruth Hellem
Clerk of District Court
by Lyla E. Milke, deputy

APPENDIX F

IN THE SUPREME COURT)
STATE OF NORTH DAKOTA)

File No. 10,709

Alpha Blair, Plaintiff and Appellant

v.

Larry Boulger, Defendant and Appellee

NOTICE OF APPEAL

Alpha Blair hereby appeals to the Supreme Court of the United States from the judgment issued and entered by the Supreme Court of North Dakota on November 28, 1984 and the Substituted Opinion of February 1, 1985, affirming the Order Awarding Summary Judgment of East-Central Judicial District Court, Cass County, North Dakota of February 27, 1984 and Judgment of March 5, 1984, and denial of December 19, 1984 of Petition for Rehearing.

This appeal is taken pursuant to 28 U.S.C. Paragraph 1257 (2).

ALPHA BLAIR
Box 33
Moorhead, Minnesota 56560
Plaintiff-Appellant

Dated March 14, 1985

Filed with Supreme Court of North Dakota March 19, 1985
Filed with Cass County, N.D. District Court, March 19, 1985

APPENDIX G

CANCELLATION OF CONTRACT FOR DEED

I, Alpha Blair, residing at 1020 First Avenue South, Fargo, North Dakota, do hereby certify that a certain Contract for Deed of January 8, 1974 recorded in the office of the Register of Deeds in the County of Cass, North Dakota, in Book F-6 of Miscl., Page 514 on January 9, 1974 at 8:15 o'clock A.M. between Alpha Blair, a widow, and Larry J. Boulger whose post office address is 123 10th St. South, Fargo, North Dakota, is hereby cancelled as of December 31, 1979.

The legal description of the land, lying and being in the County of Cass and State of North Dakota is described as follows, to-wit:

Lot Five (5) in Block Fifteen (15) of the original Townsite to the City of Fargo, according to the certified plat thereof on file and of record in the office of Register of Deeds in and for said County and State.

Alpha Blair is given the option, by written notice to declare said Contract for Deed cancelled for breach of contract, to-wit:

Allowing the present policy of insurance (on January 6, 1974) to lapse.

Let it be further known of public record that Alpha Blair is prepared to return all payments received from L.J. Boulger for said contract for deed.

Dated December 31, 1979, Fargo, North Dakota
In the presence of

Alpha Blair

STATE OF NORTH DAKOTA
County of Cass

On this 31st day of December, 1979, before me a Notary Public within and for said County, personally appeared Alpha Blair, a widow, to me known to be the person described in, and who executed the foregoing instrument, and acknowledged that she executed the same.

Brian W. Nelson
Notary Public Cass County, North Dakota
My commission expires 8-11-83

(Seal)